

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

OLD REPUBLIC INSURANCE COMPANY,	§	
as subrogee of Phoenix Aviation Managers Inc.	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Case No. 1:12-cv-01156-KJG/GBW
	§	
ECLIPSE AVIATION CORPORATION,	§	
	§	
Defendant.	§	

**ANSWER TO COMPLAINT FOR SUBROGATION AND NEGLIGENCE**

Certain Underwriters of Lloyd's, London Subscribing to Policy Number B080111789A08 ("Underwriters"), by and through the undersigned attorneys, hereby files this Answer to Plaintiff Old Republic Insurance Company's ("Old Republic") Complaint for Subrogation and Negligence against Eclipse Aviation Corporation ("Eclipse"), and answers as follows:

**Preliminary Statement**

Underwriters are providing this answer subject to a reservation of its rights and argument that it has no obligation or duty to defend or indemnify Eclipse because it has been prejudiced by a breach of its policy with Eclipse regarding the timing and notice of this claim. Underwriters have filed a declaratory judgment action in this Court, *Certain Underwriters of Lloyd's, London Subscribing to Policy No. B08011789A08 v. Old Republic Ins. Co., et al.*, Case No. 1:13-cv-00701-MV-ACT (District of New Mexico), seeking a declaration of no coverage due to Old Republic's actions that have caused a breach of the policy that has substantially prejudiced Underwriters' ability to defend Eclipse, which was liquidated years ago and no longer exists.

This Answer is provided to ensure that no further prejudice results until the coverage issue is resolved.

### **Responses to Plaintiff's Allegations**

1. Underwriters, subject to the limitations expressed above, admits the allegations of Paragraph 1.

2. Underwriters, subject to the limitations expressed above, admits the allegations of Paragraph 2.

3. Underwriters, subject to the limitations expressed above, denies the allegations of Paragraph 3.

4. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of Paragraph 4, and thus denies same.

5. Underwriters, subject to the limitations expressed above, admits that this Court has jurisdiction over the subject matter but denies that it has jurisdiction over Eclipse.

6. Underwriters, subject to the limitations expressed above, admits that venue is proper in this Court.

### **Facts**

7. In response to this allegation, Underwriters, subject to the limitations expressed above, incorporates its responses to Paragraphs 1 through 6.

8. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

9. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

10. Underwriters, subject to the limitations expressed above, lacks sufficient

knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

11. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

12. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

13. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

14. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

15. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

16. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

17. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

#### **First Claim for Relief: Negligence**

18. In response to this allegation, Underwriters, subject to the limitations expressed above, incorporates its responses to Paragraphs 1 through 17.

19. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

20. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

21. Underwriters, subject to the limitations expressed above, lacks sufficient

knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

**Second Claim for Relief: Violations of the New Mexico Unfair Practices Act**

22. In response to this allegation, Underwriters, subject to the limitations expressed above, incorporates its responses to Paragraphs 1 through 21.

23. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

24. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

25. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

26. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

27. Underwriters, subject to the limitations expressed above, lacks sufficient knowledge to admit or deny the allegations of this Paragraph, and accordingly denies same.

**AFFIRMATIVE DEFENSES**

**GENERAL DENIAL**

To the extent further facts require admission or denial, all allegations of the Complaint not expressly admitted in this Answer are denied.

**FIRST DEFENSE**

Old Republic may not pursue one or both of its claims for relief because the automatic stay imposed by 11 U.S.C. § 362 may bar those claims from being asserted at this time.

**SECOND DEFENSE**

The Complaint fails to state claims for which relief can be granted.

### **THIRD DEFENSE**

Old Republic has already obtained a judgment against Eclipse on its claim for negligence in the Second Judicial Circuit for the County of Bernalillo, State of New Mexico, in a case numbered CV-2010-05837. Old Republic's claims are barred by the doctrine of *res judicata*.

### **FOURTH DEFENSE**

Old Republic's claims are barred by the doctrine of waiver.

### **FIFTH DEFENSE**

Old Republic's claims are barred by the doctrine of estoppel.

### **SIXTH DEFENSE**

Old Republic's claims are barred by the doctrine of *laches*.

### **SEVENTH DEFENSE**

Old Republic's claims are barred by principles of equity.

### **EIGHTH DEFENSE**

Underwriters, subject to the limitations expressed above, states as an affirmative defense that there is no coverage under the relevant insurance policy for Eclipse's alleged actions.

### **NINTH DEFENSE**

Underwriters, subject to the limitations expressed above, states as an affirmative defense that Eclipse is not liable for negligence because the damage was caused by an act of God.

### **TENTH DEFENSE**

Underwriters, subject to the limitations expressed above, states as an affirmative defense that Eclipse is not liable because the damage was caused by individuals or parties other than Eclipse or outside of Eclipse's control.

### **ELEVENTH DEFENSE**

Any liability should be decreased by the percentage that any other party or non-party is liable by due to contributory negligence or comparative negligence.

#### **TWELFTH DEFENSE**

Old Republic's claims may be barred by the applicable statutes of limitations.

#### **THIRTEENTH DEFENSE**

Underwriters, subject to the limitations expressed above, raises the defense of insufficient service of process.

#### **FOURTEENTH DEFENSE**

Old Republic's claims are barred by the doctrine of unclean hands.

#### **FIFTEENTH DEFENSE**

Underwriters, subject to the limitations expressed above, does not knowingly nor intentionally waive any applicable affirmative defenses. Underwriters, subject to the limitations expressed above, reserves the right to assert additional defenses that it may discover in the course of the proceedings of this matter and to which it may be entitled under the law, including case law, statutes and rules, of the jurisdictions whose law may be found to apply to the counterclaims asserted.

#### **JURY DEMAND**

Underwriters, for itself and, to the extent it may be determined that the non-existent Eclipse is a proper party herein and represented by Underwriters subject to the limitations expressed above, requests a trial by jury.

#### **PRAYER**

For the foregoing reasons, Underwriters, subject to the limitations expressed above, respectfully requests that Plaintiff take nothing by way of its Complaint, and that the Court

award all other relief to which it is justly and equitably entitled.

Dated: October 24, 2013.

Respectfully submitted,

/s/ Marian B. Hand

W. Spencer Reid

Marian B. Hand

KELEHER MCLEOD, P.A.

201 3<sup>rd</sup> Street, NW, Suite 1200

Albuquerque, NM 87102

(505) 346-4646

(505) 346-1370 Facsimile

**ATTORNEYS FOR CERTAIN  
UNDERWRITERS OF LLOYD'S,  
LONDON SUBSCRIBING TO POLICY  
NUMBER B080111789A08,  
REPRESENTING ITS INSURED,  
ECLIPSE AVIATION CORPORATION**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument was served by operation of the ECF system to the following counsel of record on this 24th day of October, 2013.

Jeffrey Croasdell

Tyler M. Cuff

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

Post Office Box 1888

Albuquerque, New Mexico 87103

/s/ Marian Hand

Marian Hand